

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**



75-1422

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

To be argued by  
Richard A. Greenberg

7cc

B  
p/s

UNITED STATES OF AMERICA,  
Appellee,

-against-

WALTER SWIDERSKI,  
Appellant.

Docket No. 75-1422

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APPENDIX FOR APPELLANT

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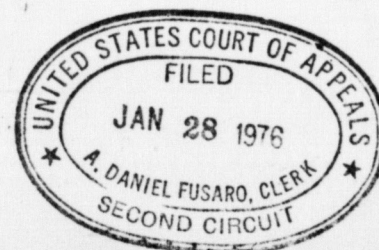
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ON APPEAL FROM A JUDGMENT  
OF THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

WILLIAM J. GALLAGHER, ESO.  
THE LEGAL AID SOCIETY  
Attorney for Appellant  
WALTER SWIDERSKI  
FEDERAL DEFENDER SERVICES UNIT  
509 United States Court House  
Foley Square  
New York, New York 10007  
(212) 732-2971

RICHARD A. GREENBERG

Of Counsel



PAGINATION AS IN ORIGINAL COPY

75 CRIM 797

D. C. Form No. 100 Rev.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U.S.:
vs.	Harry C. Batchelder, Sp
1. WALTER SWIDERSKI	791-0071
2. MARITZA DE LOS SANTOS	
	For Defendant::

07)	STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
	J.S. 2 mailed	Clerk				
	J.S. 3 mailed	Marshal				
	Violation	Docket fee				
	Title 21					
	Sec. 812, 841(a)(1), (b).					
	Distr. & possess. w/intent to distr.					
	Cocaine, II & Marihuan, I.					
	(Two Counts)					

DATE	PROCEEDINGS
8-8-75.	Filed indictment.
8-18-75	Deft. Swiderski (atty. present) Pleads not guilty. Bail fixed in the sum of \$1,500. P.R.B. continued. De Los Santos-Court directs entry of not guilty plea. Deft. R.O.R. Case assigned to Judge Bonsal for all purposes. Owen, J.
9-16-75	Filed Govt's Voir Dire.
9-20-75	Filed Govt.'s requests to charge.
9-21-75	Filed Govt.'s memo. of law re: entrapment.
9-21-75	Jury trial begun before Judge Bonsal.
9-22-75	Trial cont'd. Motion to dismiss re: deft. Los Santos-denied. Granted as to deft. Swiderski as to count 2-denied as to count 1.
9-23-75	Trial cont'd. and concluded. Deft. Swiderski guilty ct. 1. Deft. Los Santos guilty cts 1 & 2. Pre-sentence reports ordered. 12-8-75 set. for sent. Swiderski bail cont'd. Deft. Los Santos R.O.R.
10-17-75	Filed transcript of record of proceedings, dated 9/21, 22, 23, 1975. Bonsal, J.

DATE	PROCEEDINGS
12-2-75	Filed Govt.'s memo. of law in opposition to counsel for Swiderski's trial memorandum.
12-08-75	WALTER SWIDERSKI (atty. present) Filed JUDGMENT -ct.1-2 yrs. impr. pur. Sec. 3651 of T. 18, U.S. Cod, as amended, with provision deft. be confined in a JAIL TYPE institution for a period of 6 mons. as provided in the aforesaid section. Execution of the remainder of the sentence is suspended and deft. is placed on probation for a period of 3 yrs., to commence upon expiration of confinement, subject to the standing probation order of this Court. Purs. to Sec. 841, of T. 21, U.S. Code, deft. is placed on Special Parole for a period of 3 yrs., to run concurrently with his prob. Bail pending appeal fixed in the amount of \$1,500. P.R.B. Bonsal, J. issued all copies.
12-08-75	MARITZA SWIDERSKI (atty. present) Filed JUDGMENT- ct. 1-2 yrs. impr. pur. Sec. 3651 of T. 18, U.S. Code, as amended, with provision deft. be confined in a JAIL type institution for a period of 6 mons. as provided in the aforesaid section. Execution of the remainder of the sentence is suspended and deft. is placed on probation for a period of 3 yrs. to commence upon expiration of confinement, subject to the standing probation order of this Court. Pursuant to Sec. 841 of T. 21 U.S. Code, deft. is placed on Special Parole for a period of 3 yrs. to run concurrently with her probation. Deft. cont'd. R.O.R. pending appeal. Bonsal, J. issued all copies.
12-10-75	W. Swiderski-filed P.R.B. (Unsecured) pending appeal in the sum of \$1,500.
12-12-75	W. Swiderski-filed notice of appeal from judgment of 12-8-75. Mailed copies to U.S. Atty & deft.
12-15-75	M. De Los Santos-filed notice of appeal from judgment of 12-8-75. Mailed copies to U.S. Atty. & Deft.



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

75 CRIM. 797

UNITED STATES OF AMERICA

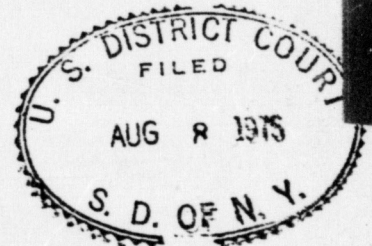
- v -

WALTER SWIDERSKI and  
MARITZA DE LOS SANTOS,

Defendants.

INDICTMENT

75 Cr.



The Grand Jury charges:

On or about the 3rd day of June, 1975, in the Southern District of New York, WALTER SWIDERSKI and MARITZA DE LOS SANTOS, the defendants, unlawfully, intentionally and knowingly did possess with intent to distribute, a Schedule II narcotic drug controlled substance, to wit, 21.5 grams of cocaine hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Seciton 2.)

## SECOND COUNT

The Grand Jury further charges:

On or about the 3rd day of June, 1975, in the Southern District of New York, WALTER SWIDERSKI and MARITZA DE LOS SANTOS, the defendants, unlawfully, intentionally, and knowingly did possess with intent to distribute, a Schedule I narcotic drug controlled substance, to wit, 7.6 grams Marihuana (Cannabis sativa L.)

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

W. M. Dove

**FOREMAN**

Paul J. Curran

PAUL J. CURRAN

United States Attorney

# MICROFILM

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**United States District Court**

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

WALTER SWIDERSKI, and  
MARITZA DE LOS SANTOS,

Defendants.

**INDICTMENT**

(21 USC §§ 812, 841(a)(1), 841(b)  
(1)(A); Title 18 USC §2.)

PAUL J. CURRAN

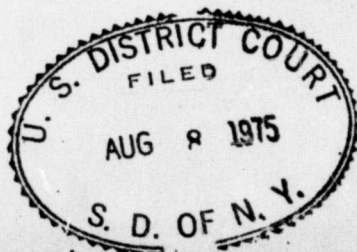
United States Attorney.

A TRUE BILL

*W. M. Davis*

Foreman.

FPI-SS-2-19-71-20M-6950



**JUDGE BONAL**

OCT 21 1975 JURY EMPOWERED TRIAL BEGUN  
OCT 22 1975 TRIAL CONTD BTH SIDS REST. MOTION  
TO DISMISS REJECT LOSSANTON DENIED. GRANTED AS  
TO REFT SWIDERSKI AS TO CT2 DENIED CT1

OCT 23 1975 TRIAL CONTD. SUMMATION BY BONAL.  
CHARGE BY THE COURT. MARSHALS SWORN  
JURY VERDICT DEFT SWIDERSKI GUILTY OF  
A REFT DE LOS SANTOS GUILTY OF LA. JURY PRICED  
PRE-SENTENCE REPORT DEFT SET FOR SENTENCE  
SWIDERSKI TRIAL CONTD. LOS SANTOS R.O.A.

DEC 8 1975 SENTENCE WALTER SWIDERSKI BY  
JURY. JACK LIPSON LEGAL COUNSEL PRESENT  
COMM. HD TO COSTARDY OF CITY. CEN TIP 22351  
IMPRISONMENT FOR 2 YR. TO SERVE 6 MOS. TRAIL  
TYPE INSTITUTION EXECUTION OF SENTENCE  
SENTENCE SUSPENDED. PROBATION 5 YR. TO 1980  
RELEASE T 21 S. 4208 H/A SPECIAL WARDEN  
TO PRON CONCURRENTLY WITH PROBATION TRANSFER  
RIGHT TO APPEAL 141115. JUDGE BONAL

DEC 8 1975 MARITZA DE LOS SANTOS H/A MARITZA  
SWIDERSKI CONVICTION ON CT2 SET ASIDE  
SENTENCED ON CT1 T. 18 SEC. 13651

Julius Wawrteu (atty)  
IMPRISONMENT 2 YRS. TO SERVE 6 MOS. IN A JAIL TYPE INSTITUTION.  
EXECUTION OF BALANCE OF SENTENCE SUSPENDED.  
PROBATION 3 YR FOLLOWING RELEASE T 21 420817  
SPECIAL PAROLE 3 YR. TO REMAIN TEMPORARILY WITH PROBATION  
ADVISED OF RIGHT TO APPEAL. NOA. PENDING APPEAL  
BONSHAL

①

USA v. 1  
Swiderski &  
DeLosSantos  
75 Cr 797  
10/23/75 3  
J. Bonsal

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# THE CHARGE OF THE COURT

J. Bonsal

THE CLERK: The Court will now charge the jury.

Spectators may leave at this time or remain  
seated until the completion of the charge.

Will you lock the door, please, Marshal?

THE COURT: Madam Forelady, as you are, Mrs.  
Marcus, by virtue of occupying the first chair, and ladies  
and gentlemen of the jury:

I would like to join with the lawyers in thank-  
ing each of you for the care and attention that you have  
shown during this short trial and to tell you that I ap-  
preciate the sacrifices that I know that each of you has  
had to make in your own personal lives so you could serve  
in this very important capacity of being on a federal  
jury.

I know you will bear with me and give me the  
same attention that you have shown throughout the trial  
so that you may understand the principles of law which  
apply to this case.

Remember I told you at the time you were selected  
that it is the jury's duty to weigh the evidence here  
calmly and dispassionately without any sympathy or without  
any prejudice for or against either the Government or

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2 either of these defendants.

3 I told you that everyone appearing before this  
4 bar of justice is entitled to a fair and impartial trial  
5 and this is regardless of his occupation or his station  
6 in life.

7 I told you when you were selected that the sub-  
8 ject matter here involved narcotic drugs and I mentioned  
9 that and I told you that that fact must not create any  
10 bias or prejudice in your minds, or prevent you from  
11 rendering an absolutely fair and impartial verdict.

12 Of course, as I told you, your verdict must be  
13 based solely on the testimony you heard from that witness  
14 chair and on the exhibits which were received in evidence  
15 and on nothing else at all.

16 Then I told you, if you will recall, that you,  
17 ladies and gentlemen, are the judges of the facts; that at  
18 the end of the trial I would instruct you as to the law  
19 and as to the law you must follow my instructions. It  
20 is not what the lawyers say the law is or  
21 what you may have read in another context or even what you  
22 may have heard from another judge; it is the instructions  
23 that I give you now.

24 Of course, as I said to you, you, the jury, are  
25 the sole judges of the facts. It is not what a lawyer

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2 may say a witness testified to or what he says the docu-  
3 ment contains or shows, nor what I might say on these sub-  
4 jects. It is what you, the jury, remember and decide.

5 I also told you when you were selected that you  
6 would observe me having conversations with one or the  
7 other of the lawyers during the trial. Indeed, I did.  
8 I sustained objections and I overruled them.

9 I told you to pay no attention to all this.  
10 This dealt with matters of law and housekeeping and what-  
11 not.

12 Above all, ladies and gentlemen, draw no infer-  
13 ences from anything I may have said during this trial which  
14 might lead you to believe that I favor one side or the other  
15 here because, of course, I do not. That's not my pre-  
16 rogative. That is yours.

17 Now, throughout this charge, ladies and gentle-  
18 men, I will instruct you that you may not convict either  
19 of these defendants unless and until you were satisfied  
20 that the Government has proven each element comprising  
21 the crime charged beyond a reasonable doubt.

22 What do we mean by beyond a reasonable doubt?  
23 Well, the words, of course, do suggest the answer. It is  
24 a doubt based on reason, a doubt which a reasonable man or  
25 woman might entertain, but a reasonable doubt is not a

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2 fanciful doubt, it is not an imagined doubt, it is not  
3 a doubt that a juror might conjure up to avoid performing  
4 an unpleasant task. It is a reasonable doubt. It is a  
5 doubt which arises in a juror's mind because of something  
6 in the evidence or the absence of evidence in the case.  
7 It is the kind of doubt which would cause a reasonable  
8 man or woman in a more serious and important matter in  
9 his or her life to hesitate to act.

10 The burden is on the Government to prove the  
11 guilt of a defendant beyond a reasonable doubt. The  
12 Government need not prove a defendant's guilt beyond all  
13 possible doubt, because after all if that were the rule,  
14 few people, however guilty they might be, would ever be  
15 convicted.

16 In this world of ours it is practically impos-  
17 sible for one to be absolutely and completely convinced of  
18 any controverted fact which by its nature is not susceptible  
19 to mathematical precision or to mathematical certainty.  
20 So the law is that the Government must prove the guilt  
21 of a defendant beyond a reasonable doubt; not beyond all  
22 possible doubt.

23 Now, when I reviewed the indictment with you  
24 I told you also when you were selected that the indictment  
25 is merely the way by which the Government calls individuals

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2 into court who it claims had violated the law, and I  
3 told you that the indictment is not evidence of the guilt  
4 of a defendant and the indictment does not detract in  
5 any degree from the presumption of innocence with which  
6 the law surrounds a defendant until his guilt is proven.

7 This presumption of innocence remains with each  
8 of these defendants throughout the trial and applies to the  
9 consideration of each of the essential elements of the  
10 crimes charged.

11 This presumption of innocence remains unless  
12 and until the jury should find that the Government has  
13 proved the guilt of the defendant beyond a reasonable  
14 doubt.

15 Each of these defendants has pled not guilty  
16 here and by doing so he has put in issue every material  
17 element of the indictment.

18 This burden has remained on the Government  
19 throughout the trial and if the Government has not proved  
20 to you that the defendant is guilty beyond a reasonable  
21 doubt, then, of course, it is your duty to find that de-  
22 fendant not guilty.

23 There are two defendants here, Mr. Swiderski and  
24 Miss De Los Santos.

25 They are charged here as two individuals and the

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2 guilt of each of them must be passed upon by you separately  
3 because guilt or innocence is a personal thing and each of  
4 these defendants has the right to the same consideration  
5 on your part as if he or she were being tried alone.

6 Now, the indictment here has two counts in it  
7 and I repeat, the indictment is merely the charge.

8 The first count charges both of the defendants  
9 with possession with intent to distribute of a controlled  
10 substance, namely, cocaine in this case, and the second  
11 count charges Miss De Los Santos alone with possession  
12 with intent to distribute of a controlled substance,  
13 marijuana.

14 I mentioned to you each of these counts must be  
15 considered by you separately and the first count must be  
16 considered by you separately as to each of the defendants.

17 The fact that you may find the defendant guilty  
18 or not guilty on one count of the indictment does not  
19 control your verdict on the other.

20 Now, ladies and gentlemen, this has been a short  
21 trial. The lawyers have summed up to you in some detail  
22 this morning and I don't intend to review the evidence here  
23 because, as I mentioned to you, it is your recollection which  
24 controls.

25 What the lawyers say or what I say is not

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2 evidence.

3 I may mention briefly what I understand to be  
4 some of the contentions here. I don't pretend that they  
5 are complete. All I am doing this for is in the hope that  
6 it may help you refresh your own recollections, which  
7 is, after all, the thing that controls.

8 Now, as I understand it, the Government is con-  
9 tending here that on June 3, 1975, each of the defendants,  
10 Swiderski and Miss De Los Santos, possessed with intent  
11 to distribute 21.5 grams of cocaine. That is count 1.

12 In count 2, the Government contends that on that  
13 same day Miss De Los Santos possessed with intent to  
14 distribute 7.6 grams of marijuana and that in both counts  
15 this was in violation of federal law.

16 As I recall it, the Government contends that  
17 Swiderski was in contact with a paid Government informer,  
18 Martin Charles Davis, on or about May 31, 1975 and that  
19 Davis arranged for Swiderski to meet with one fellow, I  
20 think he was called Carlton Bush, who would sell the  
21 cocaine to Swiderski.

22 Then on June 3, 1975, Swiderski and Miss De Los  
23 Santos went with Davis and met one Carlton Bush somewhere  
24 on West 48th Street, I think the apartment was, and worked  
25 out the purchase of four ounces of cocaine.

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2 As I recall it the Government contends that  
3 the evidence shows that both the defendants tested and  
4 snorted the cocaine and then the arrangements were made  
5 to purchase one ounce, I think for \$1250, and that they would  
6 meet again at 6:00 p.m. to arrange the sale of an additional  
7 three ounces.

8 After the meeting in the hotel, as I understand,  
9 while Swiderski was driving this van, both of the  
10 defendants were arrested on 34th Street and 6th Avenue,  
11 I believe, and that when they were arrested the cocaine  
12 and the marijuana were found in a pocketbook in the van  
13 belonging to Miss De Los Santos.

14 Now, of course, each of the defendants deny  
15 these Government contentions. The defendant Swiderski,  
16 as I understand it, contends that if he had purchased  
17 this cocaine on June 3, 1975, that he was entrapped, I  
18 think was the word the lawyer used, into making this pur-  
19 chase by the activity of Davis, the Government informer,  
20 and that he had no intention of distributing the cocaine.

21 Miss De Los Santos denies the Government's  
22 contention. I think she said she was just along, she  
23 didn't know what was going on. She was in town, she had  
24 some money because they were buying things at the boutique  
25 show and she denies that she participated in these

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transactions. I think she did testify to something about sniffing, that's the word, but that was for her own use, that had nothing to do with the sale.

Now, the statute involved here, ladies and gentlemen, is Section 841(a) of Title 21 of United States Code which provides to the extent here relevant: It shall be unlawful for any person knowingly or intentionally to possess with intent to distribute a controlled substance.

Well, you want to ask first what is a controlled substance. You heard in this case, and you heard the Government chemist testify that this was cocaine and the marijuana.

If you find that the substance here was cocaine and marijuana, they are controlled substances as used in the statute.

Now, as I mentioned to you, ladies and gentlemen, the indictment contains two counts, the first one naming both defendants and the second one naming only Miss De Los Santos, and you will return a separate verdict with respect to each count and with respect to each defendant.

The first count of the indictment reads as follows:

"The grand jury charges:

"On or about the third day of June, 1975, in

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2 the Southern District of New York" -- and these events  
3 you have heard about, 48th Street, the Chelsea Hotel,  
4 these places you heard about were all in the Southern  
5 District of New York -- "Walter Swiderski and Maritza  
6 De Los Santos, the defendants, unlawfully, intentionally  
7 and knowingly did possess with intent to distribute a  
8 Schedule II narcotic drug controlled substance, to wit,  
9 21.5 grams of cocaine hydrochloride."

10 Then count 2, which is the marijuana count,  
11 reads:

12 "On or about the third day of June, 1975, in  
13 the Southern District of New York, Maritza De Los Santos,  
14 the defendant, unlawfully, intentionally and knowingly  
15 did possess with intent to distribute a Schedule I nar-  
16 cotic drug controlled substance, to wit, 7.6 grams of  
17 marijuana."

18 Then it says in parentheses here something  
19 which I don't understand, it says (cannabis sativa L.)

20 I suppose if any of you are chemists that might  
21 mean something to you, but it doesn't mean anything to  
22 me.

23 So you can see, ladies and gentlemen, from a  
24 reading of the indictment, that the Government contends  
25 that the defendants Swiderski and De Los Santos unlawfully,

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2 knowingly, and intentionally possessed on June 3rd with  
3 intent to distribute the cocaine and that Miss De Los  
4 Santos unlawfully, knowingly and intentionally possessed  
5 with intent to distribute the marijuana.

6 Now, you recall the statute speaks about pos-  
7 session with intent to distribute. What does that mean?

8 Well, the law recognizes two types of possession;  
9 one we call actual possession and one we call constructive  
10 possession.

11 Actual possession means if you have something  
12 in your hand or something in your pocket or if you have  
13 something in your purse, or if you have something in  
14 your apartment, those are examples of actual possession.

15 Constructive possession means when you may not  
16 have the article in your hand, but you have control of it;  
17 you may have given it to somebody else for safekeeping or  
18 you may know where it is and you think you have control  
19 over the disposition of whatever the substance is.

20 Now turning to what "possess with intent to dis-  
21 tribute" means. What does that mean? Well, intent to  
22 distribute merely means that you intend at some point at a  
23 later time to pass all or some of it on. It could mean  
24 a sale. It could mean you could give it away. You could  
25 give it to a friend of yours or even to your fiancée. If

you are going to do that, that is a distribution.

Now turning back to the indictment, ladies and gentlemen, in order to convict the defendant, and I have told you to consider each of them separately, in order to convict the defendant you are considering, the Government must prove the following elements:

1. That the defendant you are considering possessed with intent to distribute the cocaine and of course in count 2 that the defendant, Miss De Los Santos, possessed with intent to distribute the marijuana.

I have been over possession and attempt to distribute with you. That is the first element.

The second element is that the defendant you are considering was acting wilfully, knowingly and unlawfully. All that means is that the defendant you are considering knew what he or she was doing, knew that he or she was in possession of a narcotic drug in violation of the law with intent to distribute.

Three, that the substance possessed was cocaine in count 1 and marijuana in count 2.

Here again you have heard the chemist's testimony and I haven't heard any contradiction of that so, I think, as far as I recall the evidence, the substance has been

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2 shown to be cocaine and marijuana.

3 Now, the Government is contending here that the  
4 package containing the cocaine, which is Exhibit 3A, as I  
5 recall it, was on this occasion on 48th Street purchased by  
6 defendant Swiderski from Carlton Bush. As I recall, the  
7 Government is contending, based on Davis' testimony, that  
8 the package was turned over to Swiderski and he placed it  
9 in his pants pocket.

10 The defendants deny that. I think the defend-  
11 ants did, in their testimony, indicate that somebody had  
12 placed Exhibit 3A in Miss De Los Santos' pocketbook, but re-  
13 gardless of which of these versions is true, there seems  
14 to be no doubt that the package was found at the time the  
15 defendants were arrested on 34th Street and 6th Avenue.

16 Now, with regard to count 1, the cocaine count,  
17 you may ask yourselves what did Miss De Los Santos have  
18 to do with it, if anything?

19 Her defense is she had nothing to do with it.  
20 She was just there.

21 As I recall the testimony, all of the negotiations  
22 were carried on by Mr. Swiderski and you may ask yourselves  
23 why is Miss De Los Santos involved at all.

24 Well, here the Government is contending that  
25 Miss De Los Santos aided and abetted Swiderski in effecting

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2 the purchase and this brings into play another statute,  
3 Section 2(A) of Title 18 of the United States Code which  
4 provides in relevant part that whoever commits an offense  
5 against the United States or aids, abets, counsels, com-  
6 mands, induces or procures its commission is punishable as  
7 a principal.

8 All that means is that if one helps somebody else  
9 to commit a crime, that person is equally liable as an aider  
10 and abettor in that crime and the Government here contends  
11 that the evidence shows that at the apartment on 48th Street  
12 Miss De Los Santos did aid and abet her fiance in acquiring  
13 the cocaine.

14 But here before you can find Miss De Los Santos  
15 guilty of aiding and abetting, the Government must prove  
16 beyond a reasonable doubt that she knowingly aided, abet-  
17 ted and assisted Swiderski in purchasing the cocaine.

18 Now, here it is immaterial that they were fiancées  
19 and it is not enough if the Government has shown that Miss  
20 De Los Santos acquiesced in what was going on. Mere pres-  
21 ence there would not be sufficient to find that she was  
22 aiding and abetting Swiderski.

23 Here to find Miss De Los Santos guilty you must  
24 find that she knowingly and willingly participated in the  
25 purchase of the cocaine; that she sought in some way to gain

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2 from her participation or that she had an interest in the  
3 outcome. The interest could be financial, it could be  
4 a relationship between two people, it doesn't matter what  
5 the interest is; did she want to help Swiderski, and here  
6 you can consider what happened.

7 I think there was evidence about the testing,  
8 the bleach test and all that kind of thing that went on.  
9 So consider that evidence and find out whether the Govern-  
10 ment has proved beyond a reasonable doubt that Miss De Los  
11 Santos did aid and abet Swiderski in the purchase of the  
12 cocaine.

13 Then as far as Swiderski is concerned, you heard  
14 his lawyer this morning contend that he was entrapped into  
15 making this purchase by the activity of Davis, the paid  
16 Government informant.

17 Now, the defense of entrapment is available to  
18 Mr. Swiderski if you find that he was induced or enticed  
19 to commit the crime here which he would not otherwise have  
20 committed.

21 If Davis' role was to afford Swiderski the op-  
22 portunity to buy cocaine, that is not entrapment. Here  
23 Swiderski must establish that the idea of purchasing the  
24 cocaine originated with Davis and not with him.

25 He must show that he had no previous disposition,

2 intent or purpose to possess or to distribute the cocaine;  
3 that it was Davis that implanted in his mind, as an innocent  
4 person, the disposition to commit the crime of purchasing  
5 the cocaine.

6 In considering the defense of entrapment, ladies  
7 and gentlemen, remember that the narcotics business, and I  
8 think the evidence here indicates that, to a certain extent,  
9 the narcotics business is one which is filled with concealment  
10 and guilt, and to apprehend violators under the narcotics laws  
11 the Government must employ various stratagems, including the  
12 use of paid informers and undercover agents.

13 You can understand that if policemen went out  
14 with their badges and uniforms and said, "We are looking  
15 for narcotics violators," they probably would not catch  
16 anybody. So in considering whether the defendant Swiderski  
17 has the defense of entrapment here, consider all of the  
18 evidence offered by the Government and by him, and this  
19 would include prior conversations between Swiderski and  
20 Davis relative to narcotics; conversations as to price and  
21 quality, evidence as to understandings to make future  
22 narcotics deals. And after you have considered this evidence  
23 determine whether the defendant Swiderski has established  
24 here that he would not have purchased the cocaine on June 3  
25 except for Davis' enticement, inducements, or blandishments,

1 rg:mg 17

2 if you will, and if you find that Swiderski has shown that,  
3 ladies and gentlemen, then the Government in addition to  
4 the elements I reviewed with you a minute ago must prove  
5 beyond a reasonable doubt that the defendant Swiderski was  
6 ready and willing to make the purchase on June 3 and that  
7 Davis merely afforded him the opportunity to do so. And if  
8 you find that the Government has not proved this beyond a  
9 reasonable doubt, then you would find the defendant Swiderski  
10 not guilty.

11 But, on the other hand, if you find that the  
12 Government has proved beyond a reasonable doubt that Swiderski  
13 did knowingly, wilfully and unlawfully purchase the cocaine  
14 and that Davis merely gave him the opportunity to do it,  
15 then you may find the defendant guilty.

16 Now, you can see from all this, ladies and gentle-  
17 men, that one of the crucial elements here is the knowledge  
18 and intent of the defendant you are considering.

19 You must find that the defendant you are consider-  
20 ing had criminal intent to violate the narcotics laws by  
21 possessing a narcotic drug with intent to distribute it.

22 How do you determine that? How do you determine  
23 whether the defendant was acting wilfully, knowingly, un-  
24 lawfully and indeed had this criminal intent?

25 Well, an act is done knowingly and wilfully

2 if it is done voluntarily and purposefully. An act is  
3 done wilfully, knowingly and unlawfully if it is done with  
4 an evil motive or purpose, such as to violate the narcotics  
5 laws.

6 But an act is not done wilfully, knowingly or  
7 unlawfully if it is done by mistake, carelessness or other  
8 innocent reason.

9 Obviously it is impossible to prove exactly what  
10 the defendant you are considering knew or what his or her  
11 intentions were on these occasions, because, after all, we  
12 can't look into a person's mind and see what knowledge he  
13 or she has in order to determine his or her specific inten-  
14 tion. But these are matters which you, the jury, can de-  
15 termine after taking careful consideration of the facts and  
16 circumstances brought out in the evidence.

17 The knowledge and intentions, the wilfullness, if  
18 you will, may only be understood when put in context with  
19 the circumstances surrounding a person's acts and the infer-  
20 ences which you, the jury, find may be reasonably drawn  
21 therefrom.

22 You might ask yourself whether these transactions  
23 were normal or whether you think they were abnormal; whether  
24 they were open or whether they were surreptitious; whether  
25 you believe that the background of the defendant made it

1 rg:mg 19

2 likely or unlikely that he or she fully understood what he  
3 or she was doing; whether you think the defendant had a  
4 motive, whether he or she had a financial or other interest  
5 in the outcome and these are the kinds of questions, ladies  
6 and gentlemen -- of course, not the only ones -- which  
7 you should ask yourselves in order to determine the knowl-  
8 edge and intentions of the defendant you are considering.

9 I don't suggest any answers to these questions  
10 because after all in your own daily lives you are called  
11 upon to use your own common sense and experience to determine  
12 from the actions or statements of others what their real  
13 intentions and purposes are, and please do that here with  
14 respect to each of these defendants.

15 Now, you will recall, I think it was Davis, tes-  
16 tified that he had had prior conversations with the defendant  
17 Swiderski regarding narcotics transactions and about price  
18 and quality and that kind of thing.

19 Now, he is not charged with any crimes except the  
20 ones that I have reviewed with you and these conversations  
21 occurred before that, so you will consider this evidence as  
22 to these prior conversations only in considering what you  
23 find the defendant Swiderski's knowledge and intentions were  
24 at the time of the transactions charged in this indictment.

25 Then another point, ladies and gentlemen, which

1  
2 you might consider on this issue of knowledge and intent:  
3 Here the Government contends that when the police officers  
4 approached 34th Street and 6th Avenue, that the Defendant  
5 Swiderski was driving the van, banged into the police cars  
6 in front and in back and the Government contends that this  
7 indicated that Swiderski was trying to flee.

8 Swiderski denies this. He says, on the contrary,  
9 I saw these people with guns and I was scared to death.  
10 I thought I was being held up or something.

11 So consider the evidence here, ladies and gentlemen,  
12 and if you find on the basis of the evidence that  
13 Swiderski was trying to escape the police, then you may  
14 consider that as circumstantial evidence from which you  
15 may infer-- you don't have to, but you may infer that the  
16 defendant knew that he was in trouble because of narcotics.  
17 In other words, consciousness of guilt.

18 But of course this evidence about the banging  
19 of the cars you can consider only with respect to Mr.  
20 Swiderski and not with respect to Miss De Los Santos.

21 The law recognizes two types of evidence, ladies  
22 and gentlemen: direct evidence and circumstantial evidence.

23 Direct evidence is the kind of thing you hear from  
24 that witness, where a witness tells you what he observed,  
25 what he did.

2 Circumstantial evidence consists of circumstances  
3 from which the jury may infer by a process of reasoning  
4 certain facts which are sought to be established as true.  
5 For example, circumstantial evidence is when you go home  
6 on a rainy day and you go in your apartment, somebody is  
7 looking at the television and they look at your hat and  
8 coat and they say, "Gee, it is raining outside."

9 Well, they haven't looked outside, they have  
10 looked at you and they say, "Your coat and hat are wet" and by  
11 a process of reasoning they figure it is raining outside.  
12 There's circumstantial evidence in this case, too, that you  
13 have heard about.

14 Both direct and circumstantial evidence are good  
15 evidence and no greater degree of weight is required whether  
16 it is circumstantial or direct. But in any event, based on  
17 all the evidence, you must be convinced beyond a reasonable  
18 doubt of the guilt of the defendant you are considering.

19 Of course, different inferences may be drawn  
20 from the evidence, whether it is direct or circumstantial.  
21 The banging up of the police cars is a case in point. That's  
22 circumstantial evidence. Here the Government asks  
23 you to infer flight, running away. The defendant  
24 asks you to infer no, he was just being scared to death, he  
25 thought he was being attacked. But it is for you, the jury,

1 rg:mg 22

2 alone, to determine what inferences you draw from the evi-  
3 dence and what facts you find to have been proven.

4 During the trial, ladies and gentlemen, and I  
5 want you to remember this, I have told you to compartmental-  
6 ize the defendants here and consider them separately. Con-  
7 sider also only the evidence that you recall relating to  
8 that defendant, not evidence that might have affected the  
9 other defendant.

10 I mention this because again all of these Davis  
11 conversations and telephone calls and activities with  
12 Swiderski prior to June 3, that kind of evidence, Swiderski  
13 is the only one involved. I think Miss De Los Santos' only  
14 connection is that she might have been at some of the meet-  
15 ings with him, but you are to consider that evidence of  
16 these considerations and negotiations, if any, that took  
17 place only with respect to Mr. Swiderski, not with respect  
18 to Miss De Los Santos.

19 There may have been other instances during the  
20 trial -- and the point I am trying to make is you don't  
21 have any spill-over between the evidence with respect to  
22 one defendant spilling over on the other defendant where  
23 the other defendant was not involved.

24 Now, you, the jury, of course, are the exclusive  
25 judges of the credibility of the witnesses who appeared

1 rg:mg 23

2 before you. I observed you giving them all careful at-  
3 tention.

4 You will subject the testimony of all of these  
5 witnesses to the same standards, whether they were Govern-  
6 ment witnesses or defense witnesses.

7 Of course, it isn't the number of witnesses. It  
8 is the quality of the testimony, the testimony that you, the  
9 jury, think most likely represented the true picture of  
10 what happened.

11 How do you determine the credibility of these  
12 witnesses?

13 Well, you saw them. How did they impress you?  
14 Did you think they were testifying frankly, candidly and  
15 fairly?

16 So here again, ladies and gentlemen, apply your  
17 common sense and experience just as you do in determining  
18 an important matter in your own lives when you are called  
19 upon to decide whether you had been given a true picture  
20 of a given situation.

21 I think you would consider a witness' demeanor,  
22 you would take into account the witness' background, oc-  
23 cupation or business, you consider a witness' candor or  
24 lack of it, the witness' possible bias, his or her means of  
25 information and the accuracy of the witness' recollection.

1 rg:mg 24

2 And you consider whether you find the witness' testimony  
3 supported or whether you find it contradicted by other tes-  
4 timony which you find to be credible or by other circum-  
5 stances. You consider whether a witness has an interest  
6 in the case.

7 Now, as I recall it, we had a couple of New York  
8 Policemen testify in here and they are law enforcement of-  
9 ficers. They have an interest as such in prosecuting  
10 people whom they believe to have violated the law.  
11 That's an interest that you can consider.

12 Now, each of the defendants testified here. They  
13 testified voluntarily. They didn't have to testify. They  
14 did that voluntarily. Obviously they have an extremely  
15 important interest here in testifying and that is a factor,  
16 their interest you may consider.

17 Of course, this doesn't mean that a witness will  
18 falsify or shade his testimony because he has an interest,  
19 it was merely a factor for you, the jury, to consider in  
20 determining the witness' credibility.

21 A witness may be discredited if you find that he  
22 made statements at other times which are inconsistent with  
23 his present testimony. He may be discredited if you  
24 make up your mind the witness is lying or misleading you and  
25 if you find that a witness lied or was misleading you, you

1 reject all of that witness' testimony if you want, or, if  
2 you find part of it reliable, you can accept that part of it  
3 and reject the rest.  
4

5 You will have the right to see any of the exhibits  
6 which have been received in evidence. If you desire to  
7 see them just let the marshal know.

8 As you deliberate, ladies and gentlemen, just  
9 remember that a jury deliberation is one in which everybody  
10 expresses their views and exchanges views.

11 Please don't be afraid to change your original  
12 view if after talking to your fellow jurors you become con-  
13 vinced that your original view is wrong.

14 But, on the other hand, ladies and gentlemen,  
15 never surrender your honest conviction in the case. If  
16 you have a honest conviction, never surrender that because  
17 you are outvoted.

18 You will seek to arrive at a verdict here providing  
19 that you can do so consistently with the conscientious con-  
20 victions of each and every one of you.

21 Now, it is obviously extremely important here to  
22 both the Government and to each of the defendants that this  
23 case be decided by you. This being a criminal case your verdict  
24 must be a unanimous verdict, a verdict reflecting the conscientious  
25

1 rg:mg 26

2 convictions of all twelve of you.

3 If after reviewing the evidence, ladies and  
4 gentlemen, you find that the defendant you are considering  
5 is not guilty, you must not hesitate for any reason to  
6 return a verdict of not guilty; but, if on the other hand,  
7 you find that the law has been violated by the defendant  
8 you are considering, you must not hesitate to render a  
9 verdict of guilty because of sympathy or any other reason  
10 at all.

11 Please don't consider the possibility of punish-  
12 ment in case you find a defendant guilty. This rests with  
13 the Court. It is of no concern of yours and must not  
14 enter into your deliberations in any way. You must not  
15 allow consideration of the possibility of punishment to  
16 affect you or make you seek to avoid the performance of an  
17 unpleasant task.

18 Finally, ladies and gentlemen, I am sure that if  
19 you listen to the views of your fellow jurors and if you  
20 apply your common sense here that you will reach a fair  
21 verdict and I remind you that that verdict must be rendered  
22 without fear, without favor, without prejudice and without  
23 sympathy.

24 Will the attorneys come forward a minute, please?

25 (At the side bar)

1 rg:mg 27

2 THE COURT: All right.

3 MR. LIPSON: Your Honor, I have several objec-  
4 tions which I would like to note for the record.

5 I object to your Honor's use of the example of  
6 fiance in the description of a person on whom an intent  
7 might be made.

8 THE COURT: I couldn't get away from the evidence  
9 on that.

10 What's next?

11 MR. LIPSON: Your Honor, I think in discussing  
12 entrapment I think you placed too heavy a burden on the de-  
13 fendant.

14 THE COURT: You have an exception on that, too.

15 MR. LIPSON: I also object to your Honor's state-  
16 ment that in order to show predisposition the Government must  
17 merely show that he had a prior intent to possess or dis-  
18 tribute. I think the Government would have to show a prior  
19 intent to possess with the intention of distributing.

20 THE COURT: I will give you an exception on that.

21 MR. LIPSON: Your Honor made reference to the prior  
22 conversations between the defendant Swiderski and Marty Davis  
23 upon which the Government is relying to establish predisposi-  
24 tion.

25 I think your Honor gave a weighted presentation

1 rg:mg 28

2 with respect to that and I object to it.

3 THE COURT: I am sure you think so but you have  
4 an exception on that.

5 I tried to be fair to you.

6 MR. LIPSON: With respect to the question of the  
7 attempted escape, the issue before the jury is not whether  
8 he was trying to escape, but whether he knew that the  
9 people from whom he was escaping were police officers.

10 THE COURT: Oh, no, you have an exception on  
11 that, too. Your point is purely one of credibility.

12 All right.

13 MR. LIPSON: I also object to your Honor's citing  
14 as an example of circumstantial evidence the alleged es-  
15 cape. I think in the context of the case it is weighted  
16 in the Government's favor.

17 THE COURT: All right.

18 MR. LIPSON: I also object to your Honor's refer-  
19 ence to phone conversations and negotiations.

20 I think the term you used was between Marty Davis  
21 and the defendant Walter Swiderski.

22 THE COURT: All right, you have an exception  
23 on that.

24 What do you have?

25 MR. WASSERSTEIN: Yes, your Honor. Exception to

your Honor's mention in recalling part of the facts with respect to Maritza De Los Santos, you mentioned she might have attended some of the meetings.

I think the evidence will reflect --

THE COURT: Their recollection controls on that.

MR. WASSERSTEIN: I think the evidence shows that she attended none of the meetings.

THE COURT: I said their recollection controls.

MR. WASSERSTEIN: I would join in all of the exceptions that my colleague took and make particular mention of the term of "fiancee" with respect to any distribution.

THE COURT: You fellows used that. It started out girl friend and you fellows told me fiancée was more delicate so I followed you.

MR. WASSERSTEIN: Your Honor, I would also except to your Honor's failure to include in the charge some sort or corrective language on the question of threats.

THE COURT: We discussed that yesterday and I thought and still think it was best not to discuss threats because I think at this point --

MR. WASSERSTEIN: Could I ask your Honor whether you would consider two brief additions? One is that the informer per se is an interested witness and the other is that prior to the application of 2A, the aiding and abetting,

your Honor's mention in recalling part of the facts with respect to Maritza De Los Santos, you mentioned she might have attended some of the meetings.

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MR. WASSERSTEIN: Could I ask your Honor whether you would consider two brief additions? One is that the informer per se is an interested witness and the other is that prior to the application of 2A, the aiding and abetting,

1 rg:mg 30

2 the jury must first find that a crime in fact has been com-  
3 mitted.

4 THE COURT: In what section?

5 MR. WASSERSTEIN: Before 2A, aiding and abetting  
6 comes into play, the jury must first find that a crime has  
7 been committed before they can consider aiding and abetting.

8 MR. BATCHELDER: That is not true, your Honor.

9 THE COURT: I will tell them about an interested  
10 witness.

11 Have you anything?

12 MR. BATCHELDER: I object to the interested wit-  
13 ness. There is no showing. You covered it generally.

14 MR. LIPSON: Your Honor, may I join in my col-  
15 league's exceptions?

16 THE COURT: Yes.

17 (In open court)

18 THE COURT: Ladies and gentlemen, remember I  
19 told you you would consider the interest a person might have  
20 and I referred to the witnesses and to the defendants.  
21 But it occurred to me you might also think about whether  
22 Mr. Davis had an interest in testifying so I just add that  
23 to the others whose interest you might consider.

24 Your verdict here, of course, on the first count,  
25 you will consider each of the defendants separately,

1 rg:mg 31

2 Mr. Swiderski and Miss De Los Santos, and you will reach  
3 a verdict of guilty or not guilty as to each of them, and  
4 on the second count, you will reach a verdict of guilty  
5 or not guilty only with respect to Miss De Los Santos.

6 All right.

7 (Alternate jurors excused)

8 (Marshal was duly sworn)

9 THE COURT: All right, ladies and gentlemen,  
10 you may retire and I hope your lunches arrive soon if they  
11 haven't already arrived.

12 Thank you very much.

13 (At 12:40 p.m., the jury adjourned to the jury  
14 room to deliberate upon their verdict)

15 THE COURT: Gentlemen, I think if we get back by  
16 a quarter of two, that will be all right.

17 (Luncheon recess)

Request No. 1

TESTIMONY OF INFORMER

The testimony of an informer who provides evidence against a defendant for pay, or for immunity from punishment, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informer's testimony has been affected by interest, or by prejudice against defendant.

Devitt and Blackmar, Federal Jury Practice and Instructions §12.02 (1970)

ENTRAPMENT

The defendants also advance the defense of entrapment, which I shall presently define.

If in fact they were entrapped, which the government denies, it is a defense to the crimes charged.

Whether or not they were entrapped is a fact issue to be decided by you upon all the evidence in the case.

The function of law enforcement is not only the prevention of crime, but also the detection and apprehension of those who violate the law.

Law enforcement officials, in their efforts to enforce the laws and to detect wrongdoers, may resort to traps, decoys and deception.

The law recognizes that artifice, strategem and stealth are necessary weapons to apprehend those engaged in, or who are about to engage in, illegal activities.

Thus, the fact that government agents merely afford favorable opportunities to a defendant for the commission of an offense does not constitute entrapment.

However, in their efforts to enforce laws, government officials or their agents, may not entrap an innocent person, who, except for the government's inducement, would not have engaged in the criminal conduct charged.

Request No. 5 (cont.)

Entrapment occurs when the criminal conduct was the product of the creative activity of law enforcement agents -- that is -- if they initiate, incite, induce, persuade, or lure a person to commit an offense which otherwise he would not commit in order that the defendant may be arrested and prosecuted.

And if that occurs, the government may not avail itself of the fruits of such instigating or inducing activities.

The defendants contend that they were induced to engage in the purchase of the 21 grams of cocaine involved in count 2 by the government informer Marty Davis. They contend that, but for his inducement and pressure they would not have purchased the cocaine.

The government denies there was any entrapment and contends that the defendant's were merely afforded the opportunity to commit the offense, which they were prepared to do on their own, and that they readily and willingly did so.

To raise the defense of entrapment, a defendant must adduce some evidence that the government officer or agent induced him to commit the offense, that is, that the government agent or officer or persons working for them solicited, proposed, initiated, broached, or suggested the commission of the offense charged.

The defendants has offered such proof through their

testimony.

If you find that the defendant has adduced some such evidence, then the government has the burden of proving beyond a reasonable doubt that the defendant was not entrapped -- that he did not need any persuasion; in short, that he was ready and willing, without persuasion, to commit the offense whenever the opportunity offered.

To sustain its rebuttal of the defense, the government must satisfy you beyond a reasonable doubt that its agents did not seduce an innocent man, but that the transaction which the defendant engaged in that resulted from the government's action was another instance of the kind of conduct that the defendants were prepared to engage in, if given the opportunity.

The proof of this may be by evidence of similar or related offenses or conduct occurring in the past, or at or about the time charged in the indictment.

The central issue is whether the defendants activities in connection with the cocaine charge contained in this indictment were caused by the urging and inducing of the government informer or whether the informer simply afforded them the opportunity to commit the crime.

If you find that the defendants were induced to commit the crime charged by the acts and conduct of the government informer, they should be acquitted.

Request No. 5 (cont.)

On the other hand, if the government has proved beyond a reasonable doubt they were ready and willing to commit the crime and were simply afforded the opportunity to do so, then the defense of entrapment fails.

Adapted from charge of the Hon. Edward Weinfeld in  
United States v Kenna, 71 Cr.226

Request No. 6

CREATIVE ACTIVITY

Now, there is another defense available to the defendants, but it is available only if you find that the facts substantiate the principle of law which I am about to give you.

You have heard the term "creative activity" and "overreading governmental participation"...

As you will recall the evidence regarding the Government's participation in this case focused to a great extent on the activities of Martin Davis, who was a paid government informant and who has testified here.

Each of the defendant's contend that, with respect to the charge contained in Count one, Martin Davis overstepped the bounds of permissible law enforcement techniques by implanting in their minds the idea to purchase cocaine, by introducing them to sellers of cocaine to which they had no access by themselves, and by inciting, inducing and in fact, pressuring them to purchase the cocaine involved in count one of this indictment. The Government denies these contentions. Before you consider this defense, you, as the judges of the facts, must determine what role Mr. Davis played in this case.

The evidence varies at several points, and the inferences that you may or may not draw could vary on certain points, as to what actually happened. Only you as jurors can resolve the factual disputes as to what occurred in May and June of

this year. Then you must determine whether these acts, as you find them, reach an intolerable degree of overreaching governmental participation. In order to sustain this defense, you must find that the activities of the government informer, Martin Davis have been intolerable and have gone beyond the limits of permissible law enforcement techniques that I have just discussed in giving you the charge of entrapment.

That is to say, if you find the overreaching participation by the government informer in the activities as you have heard them here was so fundamentally unfair as to be offensive to the basic standards of decency, and shocking to the universal sense of justice, then you must acquit each defendant, to whom this defense applies.

Furthermore, under this particular defense, you need not consider the predisposition of any defendant; because if the governmental activities reached the point that I have just defined in your own minds, then the predisposition of any defendant would not matter.

Adapted from charge of the Hon. Clarkson Fisher, USDJ  
(D. N.J.) United States v Buckalew, Cr. #602-71.  
(May 1973)

Respectfully submitted,

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Of Counsel

REQUEST NO. 7

Entrapment (If Applicable)

The defendants asserts the defense of entrapment. The defense of entrapment is based upon the policy that law enforcement agencies cannot manufacture crime. They cannot tempt innocent people into committing a crime in order to prosecute them. But a line must be drawn between the entrapment of the unwary innocent and the trap for the unwary criminal. Law enforcement agencies often use undercover investigations and informants in attempting to enforce law. Such methods are not in any way forbidden by law. Stealth and strategy are often necessary weapons in the detection and prosecution of crime. Whether or not you personally agree with the policy of using such methods is not an issue. Were it not for the use of such methods, many crimes would go undetected and unprosecuted.

Adapted from the Court's charge in  
United States v. Braver, 450 F.2d 799,  
805n. 13 (2d Cir. 1971).

REQUEST NO. 7 (Continued)

-2-

Entrapment (If Applicable)

The question of entrapment involves two issues and should be considered by you in two stages. The first issue is whether the defendants were led or induced to commit the crimes by anyone acting for the Government. That is, did the government agents initiate the criminal transaction or, on the other hand, did they merely provide a favorable opportunity for the commission of the crime by the defendant? I instruct you that the defendants must adduce some evidence that a government agent initiated the illegal conduct as opposed to merely providing them with a timely or convenient opening for their own criminal conduct. If you do not find such inducement, then there can be no entrapment regardless of the defendant's state of mind.

Even if you find such inducement, then you must consider the second issue, that is, did the government prove beyond a reasonable doubt that the inducement was not the cause of the crime but that the defendants were ready and willing to commit the crime and were but awaiting an opportunity to act. This is sometimes expressed as propensity to commit the crime.

REQUEST NO. 7 (Continued)

-3-

Entrapment (If Applicable)

Adapted from the Court's charge in  
United States v. Berger, 433 F.2d  
680, 684 (2d Cir. 1970), cert. denied,  
401 U.S. 962 (1971); United States  
v. Braver, 450 F.2d 799, 804-05  
(2d Cir. 1971):

In other words, if a person has a readiness and willingness to break the law, the mere fact that a government agent provides a favorable opportunity is no defense. If the government has satisfied you beyond a reasonable doubt that the defendants were ready and willing to commit the offenses charged, then you may find that the inducement, if any, which brought about the actual offense was no more than the providing of what appeared to the defendant to be a favorable or timely or convenient opening or facility for the criminal conduct in which the defendants were willing to engage. Simply put, were the defendants ready and willing to commit the crimes whenever they had a good opportunity, so that all the government had to do was suggest it? In such circumstances, you may find that the government's agent has not seduced an innocent person but has only provided the means or opportunity for the defendants to effectuate or realize their own then existing purpose.

REQUEST NO. 7 (Continued)

-4-

Entrapment (If Applicable)

Defendants propensity to sell narcotics may be established in various ways. For example, it may come through evidence that the defendant went along readily with the suggestion of the government agent. It may also come through evidence of preparations and subsequent acts to commit the crime.

Adapted from the charge of the Honorable William B. Herlands in United States v. Bowe, et al., 65 Cr. 189; United States v. Croob, 451 F.2d 1284 (2d Cir. 1971). United States v. Charles Harary, 70 Cr. 1104 (May 20, 1971).



Certificate of Service

January 28, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Richard A. Greenberg